Decision **03-02-072** February 27, 2003

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Establish Policies and Cost Recovery Mechanism For Generation Procurement and Renewable Resource Development.	Rulemaking 01-10-024 (Filed October 25, 2001)

INTERIM OPINION ON DECISION 02-09-053

Summary

In Decision (D.) 02-09-053, the Commission allocated the California Department of Water Resources' (DWR's) long-term power purchase contracts between Pacific Gas and Electric Company (PG&E), San Diego Gas and Electric Company (SDG&E), and Southern California Edison Company (SCE), collectively referred to as the "utilities." As explained in that decision, the allocation of DWR contracts was a necessary step towards achieving the Commission's and the Legislature's goal of returning the utilities to the procurement function by January 1, 2003.

On January 7, 2003, DWR submitted a memorandum requesting that the Commission consider modifying D.02-09-053 for the purpose of allocating four additional power purchase agreements between DWR and Madera Power, LLC, Dinuba Energy, Sierra Pacific Industries (Sonora), and Sierra Power Corp. (Terra Bella) to one or more of the utilities.

We have reviewed DWR's request and the parties' comments and grant DWR's request to modify D.02-09-053. As discussed below, adopting DWR's request to allocate four additional contracts to one or more utilities is consistent with D.02-08-071 and D.02-12-074 as well as State renewable energy policy, as articulated in SB1078 (Sher), which adopts a renewable portfolio standard (RPS) for the utilities.

DWR's Request

According to DWR's January 7, 2003, memorandum, DWR entered into contracts with Madera, Dinuba, Sonora, and Terra Bella for the purchase of unit contingent energy on December 7, 2001. The first three contracts deliver power North of Path 15, while the fourth delivers power South of Path 15. The agreements were extended on March 29, 2002 and June 26, 2002. On December 31, 2002, DWR extended the agreements until June 20, 2003 "to enable the

facilities to seek long-term agreements with an IOU subject to CPUC approval."[1] The agreements provide for automatic termination if the Commission does not allocate the agreements to one of the utilities on or before February 27, 2003.[2]

DWR identifies the potential benefits of allocating the four biomass agreements as follows: 1) The extension of these four agreements provides 48 megawatts of additional capacity and energy; 2) the allocation would provide support for renewables through the continued generation of 48 megawatts from renewable sources; 3) the biomass facilities are important to the local economies in which each is situated; and 4) the allocation provides a net positive cash flow for DWR because the contract price is less than the remittance rate.

DWR also identified the following potential concerns associated with allocating these agreements to one or more utilities: 1) The facilities were offered to the utilities during the recent interim procurement process, but were not selected; 2) The utilities will be in a long position during some hours over the next four to five months and will need to sell surplus energy; 3) The costs associated with these contracts are not included in DWR's 2003 Revenue Requirement.

Positions of the Parties

Comments on DWR's request were filed on January 27, 2003 by SCE, SDG&E and the California Biomass Energy Alliance (CBEA). DWR filed reply

[1] DWR Memorandum Section I. Page 1.

[2] DWR submitted a Memorandum on January 31, 2003, informing the Commission that DWR and the relevant contracting parties had amended the power purchase agreements extending the expiration date from January 31, 2003 to February 27, 2003.

comments on January 31, 2003. The utilities oppose adopting DWR's request to allocate the four additional biomass contracts. CBEA supports DWR's request.

SCE objects to the proposed allocation. SCE argues that DWR's petition does not explain why it is appropriate for the utilities to assume the obligations of these contracts. SCE points out that the utilities have already considered proposals from these same facilities as part of the interim procurement solicitation for renewable resources and that these proposals were not found to be competitive relative to other proposals. SCE believes that requiring the utilities to accept an allocation of these contracts would unfairly provide these parties with a "second bite at the apple."

Furthermore, SCE argues that one of the purported benefits of the allocation cited by DWR, the "support for renewables," is misleading because allocation of the Sierra Power contract would actually undermine the Commissions renewable procurement initiatives by allowing certain parties to bypass the utilities' approved solicitation processes, despite the fact that the contract price of the facilities in question is significantly higher than the Commission's "all-in" benchmark price for renewable procurement. SCE also questions why the utilities should be required to pay 60% more than DWR's contract rate for the same energy.

SCE argues that the contracts cannot be lawfully allocated to the utilities because they expire on January 31, 2003 and that the Commission cannot act before that date because none of the circumstances which justify a waiver or reduction of the 30-day public review and comment period are applicable to the current situation.

SDG&E expresses concern regarding ongoing and piecemeal proposals to modify the allocations that were adopted in D.02-09-053. SDG&E assumes that the Commission will allocate these contracts to the utilities, but states that it does

not require additional supply and any additional contract allocations would exacerbate an existing excess supply situation. SDG&E also claims that DWR's analysis of the benefits of allocating the contracts to the utilities is flawed. For example, although SDG&E is sympathetic to the economic impacts of the biomass facilities on the local economies in which each facility is located, SDG&E does not believe that ratepayer funds should be used to subsidize and sustain energy business interests that might otherwise fail. SDG&E notes that DWR's assertion that "the contract price is less than the Commission's remittance rate for energy delivered to retail end-use customers" is confusing and ignores the key fact that these contracts exceed by considerable measure the market price benchmark that was established by the Commission for interim renewables procurement. SDG&E points out that none of the facilities responded to SDG&E's Request for Offers, but that SDG&E would not have procured the power at $65/MWh. SDG&E suggests that the Commission consider the effect of providing special treatment for these four renewable suppliers who were unsuccessful in securing a contract with the utility through the Commission's adopted approach.

SDG&E suggests that, if the Commission intends to allocate these contracts to the utilities, it should only do so under four conditions: 1) the price should not exceed $53/MWh and any amount in excess of $53 should be provided by the California Energy Commission (CEC); 2) the energy should contribute to the utility's one percent renewables requirement; 3) the energy should be banked for future Renewable Portfolio Standard compliance; and 4) if transmission is constrained and the utility must resell the energy, the utility should still receive credit for the contribution of energy toward its RPS requirement.

CBEA argues that the failure of these facilities to receive contracts from the utilities is the result of noncompliance by the utilities with the one percent

renewables requirement adopted in D.02-08-071. For example, CBEA argues that much of PG&E's renewable procurement will not be certified as incremental by the CEC and that the Commission will need to order PG&E to conduct another renewables solicitation to make up the difference. With respect to SCE, CBEA notes that the Commission has held that SCE is not in compliance with the interim renewables requirement, and that SCE's two advice letters on renewables procurement have been protested and their approval is in doubt. CBEA also argues that PG&E and SCE have failed to provide the appropriate data on its renewables procurement requirement.

CBEA argues that, as a result of the utilities' noncompliance, a number of existing renewables facilities, including the four biomass facilities that are the subject of DWR's petition, were left without contracts. CBEA claims that if the Commission does not grant this petition, the contracts will be automatically terminated, and in some cases, the facilities would be forced to close permanently. CBEA notes that D.02-12-074 recommended that biomass facilities without contracts explore a number of options to keep running, including a "potential short-term contract extension through DWR." CBEA claims that the allocation of these contracts to the utilities is necessary to ensure their survival until the utilities can be brought into compliance with the one percent renewables requirement.

Discussion

The Commission's Rules of Practice and Procedures provide all interested parties (and participating state agencies, such as DWR) the opportunity to petition the Commission to makes changes to an issued decision.[3] In this case

[3] Rules of Practice and Procedure, Rule 47.

DWR has requested that the Commission consider modifying D.02-09-053 to allocate an additional four contracts to one or more utilities. For the Commission's consideration, DWR presented a brief listing of several potential benefits associated with its request, as well as several potential concerns. We have carefully reviewed DWR's request and the parties' positions and find that the benefits cited by DWR are reasonable. We also believe that there are significant benefits beyond those given by any party in their comments. We discuss these issues below.

The primary benefits cited by DWR are the fact that these contracts would provide an additional 48 megawatts of capacity and energy to California's renewable supply portfolio. Although those 48 megawatts may provide excess power during some periods, we note that DWR was subjected to a great deal of criticism for the small amount of renewable power they brought under contract during 2001. These contracts were signed at the time of the crisis, and as such, should not be treated any differently from any of the other contracts that DWR signed during this period. All other contracts were allocated in D.02-09-053. In addition, at a time when increasing renewable electricity procurement is state policy, we are reluctant to abandon existing renewable resources.

As the utilities point out in their comments, one of the Commission's approved methods of supporting and procuring renewable resources was through the one percent set-aside requirement and interim competitive solicitation process adopted in D.02-08-071. They argue that granting contracts to these four facilities outside of the adopted process would be inconsistent with prior Commission decisions and would undermine the Commission's goals by encouraging other unsuccessful bidders to seek similar relief, if not through DWR contract extensions (since DWR's authority to contract has expired), then through requests to the Commission.

It is not our intent in this decision to give preference to some bidders over others in the interim renewable solicitation process. In fact, the contracts at issue in this decision were already held by DWR prior to the Commission's interim renewable solicitation process. Thus, DWR was free to extend those contracts and request that the Commission allocate them, and they have done so. Therefore, the action we take today is wholly unrelated to the process adopted in D.02-08-071. We make no judgement about whether the contracts at issue in this decision should have been granted contracts through the interim solicitation process.

We note, however, that we are required in the future, under the terms of SB1078 establishing an RPS process, to develop mechanisms to increase the amount of renewable power under contract to utilities in the state. While we do not wish to increase renewable resources at all costs, we believe that DWR exercised its discretion in signing these contracts originally under terms that they deemed just and reasonable. Thus, it is prudent to take steps to preserve the amount of existing renewable resources under contract. As of the date of this decision, we are only beginning to develop mechanisms under the RPS process, and therefore cannot be assured that the existing resources will be competitive under those rules. They should, however, be granted a fair opportunity to participate, which the allocation of these contracts will allow.

We also believe that these biomass contracts bring significant economic benefits to the local communities in which they operate, as pointed out by CBEA in their comments. In addition, should these biomass facilities not be under contract to generate power, the waste products which fuel them are still likely to be burned, creating significant *negative* environmental effects in the State. In evaluating renewable energy bids, we so far do not have a mechanism to capture these environmental costs to be offset against the generally higher prices for

power charged under these contracts. Until such time as we develop these appropriate mechanisms under the RPS process, we find it prudent to allocate these existing DWR contracts.

We also note that D.02-12-074 did, in fact, invite biomass facilities to negotiate contract extensions with DWR. Thus, we encouraged exactly the kinds of contracts DWR proposes to allocate in this proceeding.

For all of the reasons stated above, we will allocate the contracts to the utilities as DWR has requested. Since the Madera, Dinuba, and Sonora contracts have delivery points North of Path 15, those contracts should be allocated to PG&E. Because the Terra Bella contract delivers power South of Path 15, it should be allocated to SCE.

Finally, as SDG&E suggests, we find it reasonable to make these contracts eligible for inclusion in the utilities' RPS requirements in the future, since they serve to augment the amount of renewable energy under contract to PG&E and SCE.

Assignment of Proceeding

Loretta Lynch is the assigned Commissioner and Julie Halligan is the assigned Administrative Law Judge in this proceeding.

Comments on the Alternate Decision

The alternate decision of Commissioner Peevey was mailed for comment under the provisions of Rule 77.7(f)(9) of the Commission's Rules of Practice and Procedure, which allows the Commission to reduce, but not eliminate, public comment in situations required by "public necessity." For these purposes, "public necessity" refers to circumstances in which the public interest in the Commission adopting a decision before expiration of the 30-day review and comment period clearly outweighs the public interest in having the full 30-day period for review and comment. If the Commission does not act on February 27,

2003, the DWR biomass contracts will expire, which is not in the public interest. Therefore, in this situation, public necessity requires that the Commission reduce the public comment period. Parties were given two days to comment on the alternate decision.

Comments were timely filed by PG&E, the Office of Ratepayer Advocates, CBEA, and jointly by SCE and The Utility Reform Network. DWR sent a memorandum clarifying that in sending their January 7, 2003 memorandum requesting consideration for allocating the biomass contracts, they did not wish to intervene in this proceeding, nor do they wish to become a formal party to advocate for a particular outcome.

SCE asserts that due to DWR's non-party status, the Commission should not render a decision on this matter, since DWR's request cannot be treated as a formal petition to modify a decision. We note, however, that D.02-09-053 was rendered on the basis of memoranda from DWR. In this instance, as indicated in ALJ Halligan's January 17, 2003 ruling requesting comments on DWR's memo, the Commission has decided, on its own motion, using our authority granted in Public Utilities Code Section 1708, to consider modifying D.02-09-053. Therefore, we reject SCE's argument that the Commission cannot modify D.02-09-053.

The comments also reiterate numerous arguments made in response to ALJ Halligan's January 17, 2003 ruling, and which we have addressed in the Discussion section of this decision.

Findings of Fact

1. On January 7, 2003, DWR submitted a Memorandum requesting that the Commission consider modifying D.02-09-053 for the purpose of allocating four additional power purchase contracts to one or more investor-owned utilities.

2. The Commission is modifying D.02-09-053 on our own motion, under authority granted by Public Utilities Code Section 1708.

3. Allocation of four additional biomass contracts would keep 48 MW of existing renewable resources providing power to California.

4. Contract allocation is consistent with Legislative renewable portfolio standard (RPS) procurement policies and the Commission's findings in D.02-08-071 and D.02-12-074.

5. The four biomass contracts provide environmental benefits to the communities in which they operate.

6. Failure to keep the four biomass facilities under contract could result in negative environmental consequences to the communities in which they are located.

Conclusions of Law

1. Contract allocation is reasonable in light of Legislative and Commission renewables policy and should be granted.

2. Contracts with delivery points North of Path 15 should be allocated to PG&E and South of Path 15 should be allocated to SCE.

3. The comment period on this decision should be reduced in accordance with Rule 77.7(f)(9) of the Commission's Rules of Practice and Procedure, which allows the Commission to reduce the normal 30-day public review and comment period due to "public necessity." "Public necessity" refers to circumstances in which the public interest in the Commission adopting a decision before expiration of the 30-day review and comment period clearly outweighs the public interest in having the full 30-day period for review and comment. The expiration of the biomass contracts on February 28, 2003, clearly meets this definition of public necessity.

O R D E R

IT IS ORDERED that:

1. The request to modify Decision 02-09-053 submitted by the Department of Water Resources on January 17, 2003 is granted.

2. The Madera, Dinuba, and Sonora contracts shall be allocated to PG&E.

3. The Terra Bella contract shall be allocated to SCE.

4. The renewable power under the Madera, Dinuba, Sonora, and Terra Bella contracts shall be eligible for inclusion in the utilities' renewable portfolio standard requirements for new renewable resources going forward.

5. In accordance with Rule 77.7(f)(9), which allows the Commission to reduce, but not eliminate, public comment in instances where the Commission determines that public necessity requires it, the comment period on this decision was reduced to two days.

This order is effective today.

Dated February 27, 2003, at San Francisco, California.

MICHAEL R. PEEVEY
President

GEOFFREY F. BROWN
SUSAN P. KENNEDY
Commissioners

I reserve the right to join Comr. Wood's dissent.

/s/ LORETTA M. LYNCH
Commissioner

I will file a dissent.

/ s / CARL W. WOOD
Commissioner

Dissenting Opinion of Commissioner Loretta Lynch and Commissioner Carl Wood to D.03-02-072 (Item 8a, February 27, 2003)

As a result of the majority decision, electric utility customers will be paying as much as $77.14/MWh (a steep markup from the Commission's $53.70 benchmark price) for power that is likely not to be needed. This power will come from projects that competed for selection under the utilities' renewable procurement bidding processes but failed because they were too expensive. In addition, the majority is sanctioning further power contracting by DWR, whose legal authority to enter into such contracts expired this past January 1st. Commissioner Peevey pledges that this is a one-time exception to the ban on new contracts, but fails to cite any authority for such an exception.

What is the rationale offered by the majority to support these uneconomic contracts? *First*, they argue that although we may not need the power, it is renewable unneeded power, and renewable is good. This argument, of course, falls of its own weight if the power is not useful. *Second*, they assert that at a time when the state is promoting renewables, it would be a mistake to abandon existing renewable resources. If these resources were competitive with other renewables, we would agree. However, these projects are not competitive – witness the fact that they were judged inferior to other projects in the utility solicitations.

Third, the majority argues that these projects should be provided a fair opportunity to participate in the still-developing RPS process and that the allocation of the contracts to utilities will allow that to happen. It is difficult to imagine a definition of "fair" that supports this conclusion, since these contracts constitute special treatment for projects that have not been able to make it to market in any other way.

Fourth, the majority asserts that should these projects not receive contracts, the waste products that fuel them would still likely be burned, creating significant negative environmental effects in the state. This is a remarkable leap from fact to conjecture. Where is the record that supports these assertions? Do we know what fuel would be used, where it comes from, or how it would otherwise be treated? Do we know that the fuel would not make its way to some other biomass project? Do we know that it would, in fact, be burned, rather than sent to landfill or left where it is? The majority opinion does not say. If we are going to rely on conjecture, why not conclude that if one or more of the projects were to rely on "forest thinning" for fuel, that the natural environment would improve by leaving the materials to degrade on the forest floor and contribute to animal habitat? Most significantly, where is the environmental analysis that would be needed to reach the remarkable conclusion that a failure to approve the allocation of these contracts would lead to significant negative environmental effects? It is not there,

and this concern cannot reasonably be used as a basis for approving allocation of the contracts.

Finally, the majority argues that these projects bring significant economic benefits to the local communities in which they operate. Other than a reference to an unsupported argument in one party's comments, where is the record to support this claim? What are the purported benefits? For the purposes of this decision, what makes benefits significant? More importantly, even if we can all agree that the projects do provide economic benefits to the community, what should we do about it? A new widget factory might provide economic benefits, as well. Should this Commission spend ratepayer's dollars to promote the community's economic welfare if the expenditure is not also beneficial to ratepayers? We think that the answer is clearly "no". It is one thing to recognize and advance economic development opportunities where doing so is consistent with ratepayer interests. In the absence of such a nexus, an economic development expenditure is just an unauthorized tax under another name.

We have one other significant objection to this decision. The item approved by the majority was identified as Item 8a. There is no Item 8a on the agenda for this meeting. Government Code Section 11125(b) (which is a portion of the Bagley-Keene Act) states that the notice of a meeting of this body must include a specific agenda, containing a brief description of each item to be transacted or discussed at the meeting. The Commission took no steps to add this item on an emergency basis. This item should not have been transacted or discussed at the meeting.

There may be more than one way to provide the type of meeting notice required under the Bagley-Keene Act. However, this agency has consistently provided a specific item number for each proposed decision and each alternate. Such an approach makes sense where, as is the case before this agency, the Bagley-Keene Act is overlaid with other statutory requirements effecting the identification of ALJ drafts and alternatives to those drafts. Most significantly, the agenda for this meeting continued the tradition of creating separate items for each ALJ draft and for each alternate. It is inconsistent with this approach, and undercuts the letter and intent of Bagley-Keene to decide, after the fact, that the agenda does not mean what it clearly says. The Commission did not approve Item 8, the only related matter on the agenda. To reach the result that the majority sought under that item would have required the concurrence of the ALJ, who has the right and obligation to present an order that represents her own assessment. Instead, the majority simply declared that it has always had the right to vote on an item, even if it is not on the agenda.

Our concern is that this represents an effort to reinterpret the clear language of the statute for the purpose of achieving a favored substantive outcome. It is a dangerous practice and shows a regrettable disregard for the people of the state, whose rights and interests those laws are designed to protect.

/s/ LORETTA M. LYNCH
Loretta M. Lynch
Commissioner

/s/ CARL W. WOOD
Carl W. Wood
Commissioner

San Francisco, California
February 27, 2003